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No. 87-2059

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL R. MIRRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for operating a motor vehicle while intoxicated and for operating a motor vehicle without a valid license.

2. Whether petitioner is entitled to a new trial where, because of a partially inaudible tape recording of the proceedings before the magistrate, there was no complete verbatim transcript made of those proceedings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1988. A petition for rehearing was denied on March 22, 1988. The petition for a writ of certiorari was filed on May 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States Magistrate's Court of Alexandria, Virginia, petitioner was convicted of

driving while intoxicated (DWI) and of driving with a suspended license, both in violation of Virginia law as it applies to federal enclaves through the Assimilative Crimes Act, 18 U.S.C. ~~1902 ed~~. 13. Because petitioner's DWI conviction was his third within ten years, he was subject to an enhanced penalty under Virginia law. The magistrate therefore sentenced petitioner to six months' imprisonment on the DWI charge and indefinitely suspended his driver's license. In addition, the magistrate imposed a consecutive term of ten days' incarceration on the suspended license count. The district court (Pet. App. 1) and the court of appeals (*id.* at 2-6) affirmed the convictions.

1. The pertinent facts are set out in the court of appeals' opinion (Pet. App. 2-3). Petitioner and co-defendant David L. Hamilton were arrested on the evening of February 9, 1987, while they were driving north on U.S. Route One, which passes through portions of Fort Belvoir, a federal military enclave. The arresting officers were two Fort Belvoir military policemen who first noticed petitioner and Hamilton when the truck in which they were traveling pulled over to the side of the road in the federal enclave near a gate to the fort (*id.* at 10-11). The officers saw a man—identified as petitioner—get out of the truck on the driver's side, walk unsteadily around the rear of the vehicle, and climb into the passenger's seat. At the same time, they saw a second man get out of the truck on the passenger side, walk around the vehicle, and climb into the driver's seat. The truck then drove off down Route One, weaving in and out of its lane. After following the truck for a short period of time, the officers pulled it over and asked the occupants to get out. Hamilton climbed out of the driver's seat, and petitioner got out on the passenger side. Both men smelled strongly of alcohol and had trouble standing. Each produced a driver's license

upon request, but petitioner's had the word "REVOKED" stamped across it. *Id.* at 3, 8-11.

The officers took petitioner and Hamilton to the police station, where they were given breathalyzer tests. The machine showed Hamilton's blood alcohol level to be .22 and petitioner's to be .17, both in excess of the legal limit for the operation of a motor vehicle. A license check revealed that the licenses of both men were under suspension. Pet. App. 3-4, 11-13.

2. Petitioner and Hamilton waived their right to trial before a jury, entered pleas of not guilty, and consented to be tried together before a federal magistrate. At trial, the government introduced the testimony of the arresting officers. In addition, over the defendants' objection, the government introduced copies of the defendants' Virginia driving records (GXs 3-4), which revealed the prior DWI offenses and suspensions, and documentation describing the results of the breathalyzer tests (GXs 1-2). The magistrate found both petitioner and Hamilton guilty. Pet. App. 11-12.

At the time of petitioner's trial, the proceedings in magistrate's court were tape-recorded pursuant to 18 U.S.C. 3401(e). It was later discovered, however, that a complete verbatim transcript of the proceedings could not be prepared, because the tape recordings were found to be partially inaudible. Transcripts were made of the portions of the tape recordings that were audible (see Pet. 9-10) and, in addition, the magistrate prepared a written summary of the proceedings (Pet. App. 8-13) in which she gave a witness-by-witness narrative account of the evidence that was adduced at the trial.

After a hearing, the district court ruled that the partial unavailability of a verbatim transcript of the trial proceedings neither warranted the dismissal of the charges nor

entitled petitioner to a new trial. Petitioner alleged that he was prejudiced by the unavailability of a complete transcript because (1) he was unable to contest the sufficiency of the evidence as to whether the offense occurred on the premises of Fort Belvoir; (2) he was unable to contest the sufficiency of the evidence as to whether he was driving the truck; and (3) he was unable to contest the admissibility of his prior DWI adjudications. As the district court explained, however (Pet. App. 15-16):

> The first error is one of jurisdiction. I have read the magistrate's summary and I have read the defendants' statement of facts, and I really don't find in those two statements any conflict. The magistrate has clearly set out * * * the testimony she heard. And the evidence that she believed was the officers who said they were beside the gate to Fort Belvoir and that these defendants drove past the gate. That direct evidence alone would be sufficient, it seems to me, absent some other evidence to the contrary, to show that the gate that has been marked there over some period of time was the boundaries that are in dispute.
>
> The second allegation of error deals with the question of whether or not [petitioner] was driving the vehicle. The magistrate in her report indicates that there was direct testimony, eyewitness testimony, that the two defendants changed drivers, and she believed that evidence as opposed to whatever else was put on. As far as this appeal is concerned, I am bound to view the Government's evidence in its most favorable light. And the magistrate in weighing the credibility of the witnesses believed that eyewitness testimony.
>
> The third assignment of error is that a transcript was received from the Division of Motor Vehicles that was a hearsay piece of evidence. I would find from

the record that transcript was a certified copy of the records that are contained in the offices of the Division of Motor Vehicles, and properly admitted.

3. The court of appeals affirmed (Pet. App. 2-6). In rejecting petitioner's challenge to the sufficiency of the evidence, the court first stated that the government amply proved that the offense occurred within the boundaries of a federal enclave, since "[t]wo experienced military policemen testified that they knew the boundaries of Fort Belvoir and were certain that * * * they arrested [petitioner] * * * within those boundaries" (*id.* at 5). The court also held the certified copies of petitioner's driving records—which were found to be admissible as self-authenticating documents under Fed. R. Evid. 902(2)—were sufficient to establish petitioner's prior DWI offenses (Pet. App. 5). Finally, the court held that there was sufficient evidence, based on the credited testimony of one of the arresting officers, to show that petitioner had been driving the vehicle (*id.* at 5-6). The court of appeals did not address the claim that petitioner was entitled to a new trial because of the unavailability of a complete transcript of the trial proceedings.

ARGUMENT

1. Petitioner first contends (Pet. 11-13) that the evidence was insufficient as a matter of law to establish that he was operating the motor vehicle. His claim is without merit. As the court of appeals stated, "It is undisputed that there were only two men in the truck. One of the military policemen testified that he saw [petitioner] climb out of the driver's seat immediately after the truck pulled over to the side of the road, and that he saw Hamilton climb out of the passenger seat at the same time" (Pet. App. 5-6). The officer saw the two men walk around the parked

truck, switch positions, and then drive off. When the officers stopped the truck a short time later, Hamilton was driving and petitioner was in the passenger seat. That evidence was more than ample to establish that petitioner was driving the truck when it stopped and the passengers exchanged places.

The evidence was also sufficient to establish that petitioner was under the influence of alcohol when he was driving the truck. In her summary of the proceedings, the magistrate noted that the breathalyzer test results were admitted at trial and showed that petitioner's blood alcohol exceeded the legal limit in Virginia (Pet. App. 12). Petitioner argues that the transcript of the trial does not reflect that the breathalyzer test results were ever admitted at trial. But the magistrate's remark at the time the test results were offered was inaudible on the tape recording and therefore could not be included in the verbatim transcript (see *id.* at 17). Under those circumstances, the magistrate's statement in her summary of the proceedings that the breathalyzer results were admitted as Government Exhibit 2 is sufficient to establish that the evidence was admitted.

2. Petitioner next claims (Pet. 14-16) that the unavailability of a complete verbatim transcript of the trial denied him due process and violated his rights under 18 U.S.C. 3401(e) and Rule 7(c) of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. Section 3401(e) requires that "[p]roceedings before the United States magistrates * * * shall be taken down by a court reporter or recorded by suitable sound recording equipment," and Rule 7(c) provides that the record for an appeal to the district court "shall consist of * * * any transcript, tape, or other recording of the proceedings * * *." In this case, however, a complete verbatim record of petitioner's trial could not be produced, because the

tape recording of the trial proceedings turned out to be partially inaudible. In light of that mechanical failure, the magistrate prepared a detailed, witness-by-witness summary of the proceedings in order to complete the record for possible review. Petitioner claims that that procedure was inadequate and that he is entitled to a new trial because of the failure of the recording equipment.

As a constitutional matter, criminal defendants are not invariably entitled to receive a complete verbatim trial transcript in order to pursue an appeal. In *Draper* v. *Washington,* 372 U.S. 487, 495 (1963), this Court recognized that the use of "[a]lternative methods of reporting trial proceedings are permissible," including "a full narrative statement based * * * on the trial judge's minutes taken during trial." Similarly, not every failure of a court reporter to comply with statutory recordation requirements results in per se reversible error. See, *e.g., Addison* v. *United States,* 317 F.2d 808, 810-811 (5th Cir. 1963), cert. denied, 376 U.S. 905 (1964). Thus, where, as here, a defendant had the same counsel at trial as on appeal, the defendant must show some prejudice before he is entitled to a new trial because of the absence of a complete verbatim transcript of the trial proceedings. See *Bransford* v. *Brown,* 806 F.2d 83, 86 (6th Cir. 1986), cert. denied, No. 86-6657 (May 18, 1987); *United States* v. *Taylor,* 607 F.2d 153 (5th Cir. 1979); *United States* v. *Ullrich,* 580 F.2d 765, 773 n.13 (5th Cir. 1978) (missing exhibit). That is especially true when, as here, the judge who had presided at trial is able to reconstruct the record from his notes and memory.

By statute, criminal proceedings in district court, like criminal proceedings in magistrate's court, must be recorded verbatim, 28 U.S.C. 753, and the record on appeal includes the "transcript of proceedings" in the district

court, Fed. R. App. P. 10(a). Despite that mandatory language, Fed. R. App. P. 10(c) provides that in cases in which no report of the proceedings at trial was made, or a transcript is unavailable, the parties can reconstruct the record with the assistance of the court. When Rule 10(c) is used to reconstruct a missing record, no new trial is required where it appears that the accused has suffered no actual prejudice. See *United States* v. *Smaldone,* 583 F.2d 1129, 1133-1134 (10th Cir. 1978), cert. denied, 439 U.S. 1073 (1979) (reconstruction of record regarding the missing testimony of three witnesses, including that of two co-defendants).

There is no reason why the same principle should not be applied to trials before a magistrate. By furnishing the district court with a detailed summary of the proceedings at trial, the magistrate effectively followed the procedure set forth in Fed. R. App. P. 10(c). See *United States* v. *McCulloch,* 562 F. Supp. 103, 105 (E.D. Tenn. 1983) (Fed. R. App. P. 10(c) applied to case in which tape recorders failed to operate during trial, but magistrate prepared extensive summary of proceedings). Although Fed. R. App. P. 10 is not by its terms applicable to magistrates' proceedings, a magistrate is free to apply the procedures established by that rule in appropriate cases. Rule 57 of the Federal Rules of Criminal Procedure provides that "in all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules * * *." Rule 10(c) of the Federal Rules of Appellate Procedure, which is not inconsistent with any of the rules applicable to magistrates' proceedings, is an eminently sensible means of proceeding in cases such as this.*

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* *Hardy* v. *United States,* 375 U.S. 277 (1964), on which petitioner relies, is inapposite. *Hardy* did not deal with the instant situation in

Petitioner has failed to show that he was prejudiced by the absence of a complete transcript of the trial. He claims (Pet.10) that the magistrate's summary was inaccurate because it "fail[ed] to recognize the inherent and critical disparity in testimony" of the two officers. That disparity consisted, at most, of a difference in opinion as to whether petitioner walked in front of the truck or in back of the truck when he changed places with Hamilton; petitioner does not suggest that there was any dispute between the officers on the critical question whether the exchange took place. Nor is the verdict undermined by the fact that petitioner's co-defendant, Hamilton, testified that he had been driving the truck the entire time. The magistrate could properly credit the testimony of the two sober and experienced officers over the testimony of petitioner's

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which the trier of fact has provided a narrative summary of the evidence in order to augment transcripts that are only partially complete because of an inadvertent failure of the recording device to produce a fully audible tape recording. In *Hardy*, the trial proceedings had been transcribed in their entirety; the question was whether an indigent defendant was entitled to access to a transcript while pursuing his appellate rights. As a matter of statutory construction, the Court held that "where the requirements of a nonfrivolous appeal * * * are met, or where such a showing is sought to be made, and where counsel on appeal was not counsel at the trial, the requirements placed on him [to render effective assistance of counsel on appeal] * * * cannot be discharged unless he has a transcript" of the trial proceedings (*id.* at 282). The Court in *Hardy* did not in any way suggest that the absence of a complete transcript because of a technical recordation problem would automatically entitle a defendant to a new trial. Likewise, while petitioner is correct in asserting (Pet. 15) that courts have held that the failure to make a record of the proceedings in a trial before a magistrate can constitute reversible error, the court of appeals cases on which he relies involved the complete failure to make any record of the proceedings, not a mechanical failure in the recording equipment resulting in gaps in the record that are filled in by the magistrate's summary of the proceedings.

co-defendant who was drunk at the time of the incident and had a motive to protect petitioner.

In addition, petitioner contends (Pet. 10) that he was prejudiced by the use of the summary of proceedings, because in her summary the magistrate stated that she did not recall whether petitioner objected to the admission of his Virginia driving records, while the transcript subsequently showed that he did make such an objection. Since the transcript covered that point, petitioner could not have been prejudiced by the magistrate's failure to recall whether an objection was made. In any event, as both the district court (Pet. App. 16) and the court of appeals (*id.* at 5) observed, the records were properly admitted whether or not an objection was made.

Finally, the record does not support petitioner's claim (Pet. 10) that, contrary to the magistrate's summary, "the transcription clearly shows there was no admission of [the Certificate of Analysis]" concerning his breathalyzer tests. As the transcript shows (see Pet. App. 17), the prosecutor moved for admission of the certificate, in response to which defense counsel merely noted, "Subject to cross-examination." The magistrate then made an inaudible response. That exchange cannot be categorized as a "clear[ ]" demonstration that the certificate was never admitted. To the contrary, the magistrate's notation in her summary that the Certificate of Analysis was admitted strongly suggests that her inaudible response to the prosecutor's motion was to admit the certificate. At all events, petitioner could not have been prejudiced in this regard either. As petitioner acknowledges (Pet. 8), "[t]estimony was elicited that [his] test indicated a blood alcohol count of 0.17%" and there was other testimony—both transcribed (see, *e.g.*, Pet. App. 21) and as recounted by the magistrate (*id.* at 10-11)—that indicated that petitioner

was visibly intoxicated. Thus, the certificate was merely cumulative evidence that was not essential to his conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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